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No. 82-2116

IN THE

Supreme Court of the United States

October Term, 1983

DALGETY FOODS, INC.,

Appellant,

vs.

ANGELINA AVINA,

Appellee.

On Appeal from a Judgment of the Court of Appeal of the State of California in Case No. A020025 (California Workers' Compensation Appeals Board Case Nos. 76 SAL 8071 and 77 SAL 9360)

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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I

INTRODUCTION

Appellee's Motion to Dismiss or Affirm ("Appellee's Motion") presents this Court with four putative reasons to affirm the judgment below.[1] First, Appellant argues that the exceptions to arbitral finality announced in *Gardner-Denver*[2] and *Barrentine*[3] should extend to all statutes,

[1]Although Appellee nominally asks for dismissal of the appeal as well, *see* Appellee's Motion at 1, dismissal is plainly inappropriate because Appellee does not dispute that 28 U.S.C. § 1257(2) gives this Court appellate jurisdiction to review the judgment below.

[2]*Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974).

[3]*Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981).

whether federal or state, which create substantive rights in individual employees. *See* Appellee's Motion at 6-7. Second, Appellee contends that collateral estoppel does not affect the judgment below because the arbitrator should have decided the case without reaching the safety issue. *See id.* at 12. Third, Appellee claims that federal preemption should not apply because California has an overriding local interest at stake. *See id.* at 17-23. Finally, Appellee declares that any prejudice suffered by Appellant in connection with the procedural fiasco in the California Supreme Court resulted from Appellant's own lack of due diligence. *See id.* at 26.

Appellant respectfully submits that none of these contentions justifies summary affirmance. To the contrary, Appellee's own arguments disclose the importance of the issues presented by the appeal and the need for this Court's guidance.

II
ARGUMENT

A. Gardner-Denver and Barrentine.

Appellee succinctly frames the question presented by this appeal about the scope of the *Gardner-Denver* and *Barrentine* exceptions to arbitral finality:

> [Appellant] suggests that this Court decided [*Gardner-Denver*] as it did only because conflicting labor policies were involved and that this decision would and should be otherwise when a state law conflicts with the national policy favoring arbitral finality.
>
> [Appellee] submits that the crucial factor is not whether two federal policies or statutes are involved but whether a statute is involved, be it federal or state, which embodies minimum substantive guar-

antees for individual workers and reflects an important public policy.

Appellee's Motion at 6-7.

Appellant respectfully submits that this dispute is not suitable for summary adjudication. For one thing, sensitive competing interests must be reconciled: federal arbitral finality wars with state self-determination; collective bargaining with individual employee rights. The exhaustive analysis that comes with this Court's plenary review would no doubt lead to an appropriate balance of these interests, but trusting to serendipity is surely unwise.

This is particulary true because an inappropriate balance would have highly undesirable results. Consider, for example, the effect of Appellee's proposed rule in a State where all "unjust" discharges were prohibited by statute. Appellee's rule would destroy the incentive for an employer to agree to arbitrate the propriety of discharges (why invite double jeopardy?) and would emasculate the federal policy promoting the resolution of industrial disputes through collective bargaining.

Appellant submits that federal labor policy should not be left to the regional whims of State legislators without this Court's plenary consideration of whether, or under what circumstances, that would be appropriate.

B. The Scope of the Arbitrator's Decision.

The dispositive issue in the Section 132a proceedings below was whether Appellee's continued employment did, as Appellant believed, present an undue safety risk. Appellant has argued that the arbitrator's decision collaterally estops Appellee on that issue. Appellee now claims that the arbitrator properly looked only at whether the discharge was arbitrary and capricious; he should not,

therefore, have decided the safety issue, and his findings on that issue were mere dicta which the tribunals below were free to ignore. *See* Appellee's Motion at 12.

Five defects destroy this argument. First, it is an appellate afterthought which was neither preserved by Appellee nor adopted as a rationale for the decision below. *See* Jurisdictional Statement at 6 n. 6. Second, it seizes on the phrasing of the formal concluding sentence of the arbitrator's relatively long opinion in defiance of the plain focus of the opinion itself. *Compare* Appendix G at 164-65 *with id.* at 157-64; *see* Jurisdictional Statement at 6 n. 6.

Third, even that precious phrasing does not justify Appellee's characterization. The sentence reads: "It is the conclusion of the Arbitrator that the Company did not violate the collective bargaining agreement, was not arbitrary or capricious in reaching its decision; therefore, the Arbitrator is compelled to deny the grievance and sustain the discharge." Appendix G at 164-65. Appellee's construction would have us replace the comma after "collective bargaining agreement" with the phrase "because the Company", amending the sentence to read: "the Company did not violate the collective bargaining agreement *because the Company* was not arbitrary or capricious in reaching its decision". That is a heavy load for a comma to carry; it might just as well mean "and" or some other conjunction, and its meaning can hardly be determined without reference to the preceding pages of discussion. Yet Appellee's entire case rests on that comma.

Fourth, Appllee's argument is internally inconsistent. If for collateral estoppel purposes the Court cannot look beyond the arbitrator's concluding sentence, as Appellee

contends while she attempts to circumnavigate the arbitrator's clearly expressed opinion on the safety issue, then the Court should not look beyond that conclusion to evaluate the arbitrator's position on any other issue. Yet Appellee herself argues in another context that "[t]he arbitrator clearly decided that Dalgety genuinely believed Mrs. Avina to be a danger to the work place." Appellee's Motion at 14.

Finally, the arbitrator himself clearly and repeatedly indicated that he considered the risk of injury to be the critical consideration. In fact, virtually his entire opinion is taken up with discussing the extent of injury and safety risk. To take one example, the arbitrator said:

> The Arbitrator has intensely considered the provisions of the collective bargaining agreement and the points made in Union counsel's brief. Casting aside, for the moment, the contract provisions and legal points at hand (although these are not being abandoned), the Arbitrator must also consider this matter in terms of its impact on Ms. Avina as a human being. The question arises: What will the impact and effect on her be if she is returned to her employment with the Company? . . . [F]or how long, in her circumstances, could she perform this work? . . . We do truly believe that manual labor of the type required on this job and, for that matter, any other type of job that may become available to Ms. Avina, will severely shorten the productive span of her life. *This Arbitrator has never been able to escape these considerations in matters of this kind.* The Arbitrator is also aware that many other arbitrators have considered injury matters from this point of view.

Appendix G at 163 (emphasis added); *see* Jurisdictional Statement at 6 n. 6.

In sum, the arbitrator plainly considered himself bound to determine the extent of the risk of injury presented by Appellee's continued employment. The record

contains no basis for rejecting the arbitrator's view. Appellant respectfully submits that, under these circumstances, the arbitrator's safety findings cannot be deemed mere dicta which were properly ignored by the tribunals below.

C. Overriding State Interest.

Appellee's third ground for summary adjudication is the claim that, even if federal law would otherwise make the arbitration decision dispositive of the Section 132a claim on the facts of this case, California's strong interest in regulating employment discrimination and workers' compensation matters overrides contrary federal law. *See* Appellee's Motion at 17-18, 22. The threshold infirmity in Appellee's argument is its tenuous relation to the decision below. Because no tribunal in this case ever explored the question of how Appellant's position might threaten interference with a legitimate state interest, the record is spare on this critical point.

Appellee herself advances two possibilities. First, she contends that Appellant's position would permit unionized, economically strong employers to remove themselves from Section 132a's reach despite the California Supreme Court's declaration in *Judson Steel*[4] that California's interest in protecting against employment discrimination precludes a collective bargaining agreement from immunizing an employer from Section 132a liability. *See* Appellee's Motion at 7-8. Appellee gives us this parade of horribles:

> If the position urged by Dalgety is adopted, the same kind of conduct might result in a misdemeanor charge and economic penalty against an employer who is

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[4] *Judson Steel v. Workers' Compensation Appeals Board*, 22 Cal. 3d 658, 150 Cal. Rptr. 250 (1978).

> not party to a collective bargaining agreement and no sanction whatsoever against an employer who is. An employer with superior bargaining strength could effectively relieve himself by private contract of his public duty under Section 132a and its purpose would be nullified.

Id.

But Appellee's parade ends in a blind alley. This appeal does not involve a collective bargaining agreement that purports to destroy employee rights under Section 132a. To the contrary, the contract at issue here expressly prohibits employment discrimination, including handicap discrimination, "as provided in the appropriate State . . . laws." Appendix A at 3; *see id.* at 5; *see also* Jurisdictional Statement at 5. Appellant contends not that its collective bargaining agreement exempts it from all liability under Section 132a, but rather that the factual issues dispositive of Appellee's Section 132a claim were decided in arbitration and that federal law requires California to honor the arbitrator's decision.

This brings us to Appellee's second claim of overriding state interest: "[Section 132a] on its face does not provide that a prior arbitral decision forecloses a worker's right to relief. To the contrary, it vests 'full power, authority, and jurisdiction' in the appeals board to try and determine a worker's claim." Appellee's Motion at 7. Thus, Appellee evidently contends that California has a compelling interest in having Section 132a issues determined exclusively in California tribunals. With this step, however, Appellee moves far past the position taken by the California Supreme Court in *Judson Steel, supra:* even that court acknowledged that, in a proper case, Section 132a litigation in a California tribunal might be pre-

empted by factually related proceedings before the National Labor Relations Board. *See* 22 Cal. 2d at 668 n. 8.[5]

Moreover, Appellee's argument proves too much. Either Appellee's notion of a compelling state interest in procedural exclusivity extends so far that it would deny collateral estoppel effect even to factual findings made by federal courts in the course of addressing issues of federal law or, if limited to arbitration decisions, it converts the compelling state interest argument into a mere recapitulation of Appellee's contention that the *Gardner-Denver* and *Barrentine* exceptions to arbitral finality should apply to state statutes. Appellant respectfully submits that, in either event, the step Appellee asks this Court to take should first be subjected to the Court's plenary consideration.

D. Due Process.

Appellee contends that the California Supreme Court did not deny Appellant due process because Appellant's "failure to make a timely response to [Appellee's successful] petition was clearly due to its own oversight and not to any refusal by the California Supreme Court to permit opposition to Mrs. Avina's petition." Appellee's Motion at 26.

Appellee's barb misses the mark.[6] Had the California Supreme Court considered the parties' evidence and ruled

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[5]It is useful to remember that the National Labor Relations Board itself frequently defers to arbitration under collective bargaining agreements. *See, e.g. Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

[6]Interestingly, Appellee herself cast doubt on whether the petition really was mailed to Appellant before the California Supreme Court granted it. Appellee tells this Court that, "[i]n her 'Response to [Appellant's] Petition for Rehearing [to the

(Continued on next page)

that Appellant's counsel lied when he claimed not to have received Appellee's petition, Appellant's due process claim would not arise. But the California Supreme Court did not dismiss Appellant's petition for rehearing as Appellee contends, *see* Appellee's Motion at 4; that court instead refused to accept Appellant's petition even for filing. *See* Jurisdictional Statement at 13 n. 12.

In other words, the California Supreme Court refused to allow Appellant even to *present* its claim that it had not been served with Appellee's successful petition. Why? Because the court believed that once it had granted the petition (in the absence of opposition) it lost jurisdiction over the matter. Can this Kafkaesque procedure comport with due process?

III

CONCLUSION

For the foregoing reasons, Appellant asks this Court to deny Appellee's Motion and grant plenary consideration of the questions presented by the appeal.

DATED: September 19, 1983.

Respectfully submitted,
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California Supreme Court],' counsel for Mrs. Avina stated that Dalgety had been served the copy of the petition at the time it was filed." Appellee's Motion at 26. In fact, however, Appellee's attorney said only that he "reviewed the file in this matter (Mr. Lombardo, who has been handling this case, is out of the office), and *according to our file,*" the petition had been mailed (presumably to Appellant). Appendix 00 at 535 (emphasis added).